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Loh Kwee Eng v Phua Nai Peng

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HIGH COURT (MUAR) — DIVORCE PETITION NO 33–121 OF 2010
UMI KALTHUM J
5 JULY 2011

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Family Law — Financial obligation — Maintenance — Children — Respondent failing to show proof of actual income despite being served with notice to produce — Respondent deriving lucrative income — Child schooling in secondary school — Maintenance of RM500 per month ordered

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Family Law — Matrimonial property — Division of property — Claim for matrimonial home allegedly acquired solely by petitioner wife — Whether respondent husband entitled to a share of matrimonial home — Whether respondent husband had contributed to purchase of property — Petitioner and children forced to leave property due to respondent's misbehavior — Respondent

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refusing to vacate property and continuing living there while paying monthly loan repayment — Whether constituted contribution towards property — Law Reform (Marriage and Divorce) Act 1976 s 76(1) & (2)

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The petitioner and the respondent were married on 10 May 1986 and stayed in a house at Batu Pahat, Johor ('the said property'). Their marriage had irretrievably broken down. They had three children and their last daughter was underaged. The said property was registered in the petitioner's name and was charged to the bank. The petitioner contended that the said property belonged to her and that it was purchased and financed by her solely. The petitioner

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alleged that the respondent did not contribute financially to the upbringing of the children, frequently disturbed the peace of the family by making noise, beating her and their daughters. The petitioner thus filed this divorce petition wherein she, inter alia, claimed for: (i) maintenance of RM500 per month for the children; and (ii) the respondent to vacate and give vacant possession of the

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said property. According to the petitioner, she and her children were forced to leave the said property due to the respondent's misbehavior. The respondent had refused to vacate the said property and had continued living there while paying the monthly loan repayment. Due to this, the petitioner had to buy another condominium unit as an alternative residence for her and her children.

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The petitioner stated that she stopped paying the monthly loan repayment towards the said property since she moved out. The respondent contended that he had contributed to the said property and thus it was matrimonial home. Hence the respondent prayed for the said property to be sold and he be given half share of the sale price. The respondent also claimed that he was unable to

pay maintenance for the children as he did not earn enough and was in ill health. A

Held:

(1) Section 76 of the Law Reform (Divorce and Marriage) Act 1976 ('the Act') empowers the court to order the division of matrimonial assets. The portion of s 76 which applied to this case were sub-ss (1) and (2) (see para 12(a)). B

(2) The said property was acquired during the marriage. Even though in the marriage certificate the petitioner was shown as having no job, the court accepted her testimony that she was working at that time. The respondent exhibited a mean personality in terms of his non-supporting the petitioner and the children financially let alone emotionally, and had a tendency to being abusive physically and mentally to them. That being the kind of person the respondent was, the court could not accept his testimony as being true when he testified that he was the one who paid the deposit sum for the said property and not the respondent, and yet at the same time his agreeing to the petitioner's 'request' to have the said property registered in her name and not his name just because she had asked him to do so. The respondent was also unable to produce contemporaneous documentary evidence to show that he had contributed to the payment of the said property (see para 12(b), (c) & (d)). C D E F

(3) The respondent's payment of the monthly bank repayments after the petitioner and her daughters left the said property was only right and proper as he would have had to pay rental towards another accommodation if he had decided to move out. The said repayments did not constitute the respondent's 'contribution' towards the said property (see para 12(g)). G

(4) The fact that the petitioner also owned the condominium unit did not have a bearing on the finding with regards to the almost non-existent contribution by the respondent towards the acquiring of the said property by the petitioner (see para 12(k)). H

(5) The respondent failed to show proof of his actual income, even though he had been served with a notice to produce. The respondent had all the while not maintained the third child. Based on the fact that the respondent played the share market and derived a rather lucrative income and the fact that the third child was schooling in the secondary school, the respondent was ordered to pay maintenance of RM500 per month to the third child (see para 149a), (b) & (d)). I

[Bahasa Malaysia summary

Pempetisyen dan responden telah berkahwin pada 10 Mei 1986 dan tinggal di sebuah rumah di Batu Pahat, Johor ('hartanah tersebut'). Perkahwinan mereka bagaimanapun tidak dapat diselamatkan. Mereka mempunyai tiga orang anak dan anak perempuan bongsu yang di bawah umur. Hartanah tersebut telah didaftarkan atas nama pempetisyen dan dicagarkan ke bank. Pempetisyen menegaskan bahawa hartanah tersebut adalah miliknya dan bahawa ia telah dibeli dan dibiayai sepenuhnya olehnya. Pempetisyen mengatakan bahawa responden tidak menyumbang dari segi kewangan untuk membesarkan anak-anak, seringkali mengganggu keharmonian keluarga dengan membuat bising, memukulnya dan anak-anak perempuan mereka. Pempetisyen dengan itu telah memfailkan petisyen perceraian ini di mana dia, antara lain, menuntut untuk: (i) nafkah RM500 setiap bulan untuk anak-anak; dan (ii) responden mengosongkan dan memberi milikan kosong terhadap hartanah tersbeut. Menurut pempetisyen, dia dan anak-anaknya dipaksa meninggalkan hartanah tersebut akibat kelakuan buruk responden. Responden enggan mengosongkan hartanah tersebut dan terus tinggal di situ dengan membayar bayaran balik pinjaman bulanan. Akibat ini, pempetisyen terpaksa membeli satu lagi unit kondominium sebagai tempat tinggal alternatif untuk dirinya dan anak-anak. Pempetisyen menyatakan bahawa dia telah berhenti membayar bayaran balik pinjaman bulanan untuk hartanah tersebut sejak dia keluar dari situ. Responden menegaskan bahawa dia telah menyumbang kepada hartanah tersebut dan oleh itu ia adalah rumah perkahwinan. Justeru itu responden memohon agar hartanah tersebut dijual dan separuh daripada harga jualan diberikannya. Responden juga mendakwa bahawa dia tidak mampu membayar nafkah anak-anak kerana dia tidak mempunyai pendapatan yang mencukupi dan tidak sihat.

Diputuskan:

(1) Seksyen 76 Akta Memperbaharui Undang-Undang (Perceraian dan Perkahwinan) 1976 ('Akta') memberi kuasa kepada mahkamah untuk memerintahkan pembahagian aset perkahwinan. Bahagian s 76 yang memohon untuk kes ini ialah sub-ss (1) dan (2) (lihat perenggan 12(a)).

(2) Hartanah tersebut telah diperoleh dalam masa perkahwinan itu. Walaupun dalam sijil perkahwinan pempetisyen telah dinyatakan sebagai tidak mempunyai pekerjaan, mahkamah menerima keterangannya bahawa dia bekerja pada masa itu. Responden menunjukkan keperibadian yang garang kerana tidak menyokong pempetisyen dan anak-anak dari segi kewangan apatah lagi emosi, dan mempunyai kecenderungan untuk bersikap mendera secara fizikal dan mental kepada mereka. Berdasarkan sikap responden ini, mahkamah tidak dapat menerima keterangannya sebagai yang benar apabila dia memberi keterangan bahawa dialah yang membayar jumlah wang deposit untuk hartanah tersebut dan bukan responden, walhal pada masa yang sama

bersetuju dengan 'permintaan' pempetisyen untuk mendaftarkan hartanah tersebut atas nama pempetisyen dan bukan namanya semata-mata kerana pempetisyen telah memintanya berbuat demikian. Responden juga tidak dapat untuk mengemukakan keterangan dokumentar terkini untuk menunjukkan bahawa dia telah menyumbang kepada pembayaran harta tersebut (lihat para 12(b), (c) & (d)).

(3) Bayaran responden untuk bayaran balik bulanan kepada bank selepas pempetisyen dan anak-anak perempuannya keluar dari hartanah tersebut adalah wajar dan patut kepada dia terpaksa juga membayar sewa untuk tempat tinggal lain jika dia membuat keputusan untuk keluar dari situ. Bayaran-bayaran balik tersebut tidak membentuk 'sumbangan' responden terhadap hartanah tersebut (lihat perenggan 12(g)).

(4) Fakta bahawa pempetisyen juga memiliki unit kondominium tidak memberi kesan kepada penemuan berkaitan sumbangan yang tidak wujud oleh responden terhadap pemerolehan hartanah tersebut oleh pempetisyen (lihat perenggan 12(k)).

(5) Responden telah gagal menunjukkan bukti pendapatan sebenarnya, meskipun dia telah disampaikan notis untuk mengemukakannya. Responden selama ini tidak memberi nafkah kepada anak ketiga. Berdasarkan fakta bahawa responden telah bermain di pasaran saham dan memperoleh pendapatan lumayan dan hakikat bahawa anak ketiga masih bersekolah di sekolah menengah, responden telah diperintahkan membayar nafkah sebanyak RM500 setiap bulan kepada anak ketiga tersebut (lihat perenggan 14(a), (b) & (d)).]

Notes

For cases on division of property, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4152–4154.

For cases on maintanance, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3883–3921.

Cases referred to

Heng Peng Hoo & Anor Re [1989] 3 MLJ 103; [1989] 1 CLJ (Rep) 639 (refd)

Legislation referred to

Law Reform (Divorce and Marriage) Act 1976 s 76, 76(1), (2)
National Land Code Form 19B

Low Khim Piow (KP Low & Co) for the plaintiff.

Allen Yu Chin Aun (Allen Yu Chin Aun & Co) for the defendant.

Umi Kalthum J:

THE DIVORCE PETITION

[1] The petitioner in her petition in encl (2) prayed, amongst other things, for the following orders:

(a) the respondent by himself or his agent or his representative be prohibited from disturbing or use of force against the petitioner and her daughters Phua Sin Mei (SP1) and Phua Sin Hui;

(b) the marriage between the petitioner and the respondent be dissolved;

(c) the custody, control and care of Phua Sin Mei and Phua Sin Hui be given to the petitioner with reasonable access to the respondent;

(d) the respondent to pay the petitioner maintenance for the three children at RM500 per month until each child has reached age of majority;

(e) the respondent to vacate the petitioner's single terrace house/land known as Geran 58949 (before known as HS(D)26027), Lot 21221, Mukim Simpang Kanan, Daerah Batu Pahat, Johor at No 54, Jalan Murni, Taman Murni, 83000 Batu Pahat, Johor ('the said property') and to give vacant possession of the said property immediately from the date of this order;

(f) if the court finds that the said property is matrimonial property and that the respondent has an interest or a valid claim over the said property, the said property be offered for sale to any interested party within seven days from the date of the decree nisi based on the market price and the sale price be divided between the petitioner and the respondent in accordance with the court's discretion, less any redeeming sum to the existing holder of the charge; and

(g) the respondent is prohibited from entering into any agreement to sell or rent the said property save in accordance with the court's order.

THE FACTS

[2] The petitioner and the respondent were married on 10 May 1986 and stayed at the said property. Their marriage has irretrievably broken down. There are three children to the marriage, they are:

(a) Phua Wee Keong (son) age 24;

(b) Phua Sin Mei (daughter) age 17; and

(c) Phua Sin Hui (daughter) age 13.

[3] The said property is registered in the petitioner's name on 7 January 1992 (pp 11–13, B) and is charged to Mayban Finance Bhd/Malayan Banking Bhd. It is the petitioner's contention that the said property belongs to her and that it was purchased and financed by her solely. The petitioner alleged that the respondent did not contribute financially to the upbringing of the children, frequently disturbed the peace of the family by making noise, beating the daughters until they are afraid of him. The petitioner also alleged that the respondent had perpetrated domestic violence on her person for a long period of time, thus this had led her to file this petition praying for the said orders.

[4] In his reply, the respondent contended that the said property was bought from monies he inherited from his late father's estate as well as from his own money. He therefore regards the said property as the matrimonial home, and prayed that it be sold at market price and be given half share of the sale price. The respondent maintains that he is unable to pay maintenance to the children as he does not earn enough to support them financially, and is in ill health which prevents him from earning more. The respondent in his reply to the petition (para 8) in fact is asking for the petitioner to support him financially.

[5] On the first date this matter was set down for trial (17 July 2010), both parties had agreed to divorce and the custody of the third underaged child (daughter) be given to the petitioner with reasonable access to the respondent. The only contentious issues left for the court to decide are on the division of the matrimonial home/property and the maintenance for the third underage child. The petitioner did not ask for her own maintenance.

MATRIMONIAL PROPERTY

[6] There appears to be two types of matrimonial property. One is in the form of the said property. The other is in the form of the shares in the CDS account of the respondent No 086–002–000935148 as referred to by the petitioner only in her reply to the respondent's answer to the petition, and that too by way of refuting the respondent's alleged income of only RM700 a month. The petitioner is not seriously asking for a share of the proceeds of the respondent's shares and I will not give an order in its regard.

[7] This then leaves the issue of the said property, being the matrimonial home. The respondent is seeking a half share of the matrimonial home which is registered in the petitioner's name. The petitioner on the other hand contends that the said property was bought and paid for with her own money save for the period of time she and her two daughters were forced to leave the matrimonial home due to the misbehavior of the respondent wherein the petitioner stated in Q & A19, P2:

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> Ini adalah kerana peristiwa Responden mengamuk, membaling barang-barang dalam rumah dan kemudian memukul anak perempuannya PHUA SIN MEI merupakan insiden terakhir yang menyebabkan saya memutuskan setakat itu saya dan anak-anak perempuan saya tidak boleh menahan penderitaan oleh Responden.

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The petitioner was forced to rent another house at No 56, Jalan Maju 17, Taman Maju, 83000 Batu Pahat, Johor ('Jalan Maju House') for five years from September 2007 until September 2012, leaving the respondent to occupy the said property. The petitioner had to rent the Jalan Maju House despite the fact she had bought another condominium unit M3–2–245, Kondominium Hillview Loft, Jalan Melur, Batu Pahat, on 24 November 2006 as the

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condominium unit was not ready yet. She bought the condominium unit as an alternative residence for her and her daughters in order to avoid further emotional break down as a result of the respondent's mistreatment of her and mistreatment of her daughters.

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[8] With regard to the said property, the petitioner claims that she bought the said property for the price of RM67,300 and that she had paid RM40,000 cash to the respondent with the request for the respondent to assist her to pay part of the purchase price, and also for the respondent to invest in shares. The

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petitioner exhibited on pp 14–16, B the bank's letter to her approving her application for a RM35,000 housing loan taken out by her for the purchase of said property. She contended that she was the one who had expended effort in the purchase of the said property with no involvement by the respondent. The petitioner was able to exhibit the receipts for RM730 and RM6,000 issued by

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the developer, that is, Kumpulan Hak Jaya Sdn Bhd, to her as payment for the deposit of the said property — see p 17, B. From the payment receipts issued by the developer it appeared that the moneys were paid part in cash and part by cheques drawn on the respondent's account. The petitioner explained why this mode was used as — In Q & A 33, P2:

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> Sebabnya dari RM40,000.00 yang saya serahkan kepada Responden, ada antara jumlah tersebut telah diguna pakai oleh Responden untuk membeli saham. Jadi sementara itu Responden tidak dapat membayar sekaligus dengan tunai yang saya beri, lalu menggunakan cek dari akaun Responden dengan OCBC Bank atau Public Bank Bhd.

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The cheques used were the respondent's for the simple reason the petitioner did not have chequing facilities.

[9] According to the petitioner she stopped paying the monthly loan

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repayment towards the said property since she moved out of the matrimonial home because, in her answer to question 37, P2:

> Ini adalah kerana Responden langsung tidak memberi nafkah kepada saya untuk menyara 3 orang anak, membayar bil-bil air, elektrik dan telefon dan jika dicampur semua jumlah lebih kurang RM2,000/- sebulan.

> Saya perlu juga tanggung beban menyewa rumah alternatif dengan membayar sewa sejumlah RM260.00 sebulan campur bil-bil elektrik dan air lebih kurang RM100.00 sebulan. Tambahan pula, saya juga perlu membayar ansuran pinjaman bank untuk pembelian Apartmen tersebut. Jadi saya tidak mampu lagi meneruskan membayar ansuran pinjaman bank untuk rumah Taman Murni tersebut.

That she did ask the respondent to vacate the said property and if not the respondent has to pay rental to her as she did not agree to the respondent staying in her house for free. The respondent refused to leave the said property and had instead paid for the monthly bank repayments.

[10] The respondent alleged that at the time he married the petitioner he worked as a clerk at Pua Trading, belonging to his uncle. He was earning RM400– RM500. He alleged that the petitioner was not working at the time of the marriage being registered, but that she subsequently worked as a hairdresser. Later in 1992 the respondent worked as an insurance agent earning RM800–RM1,000 a month; in that year the petitioner had opened her own shop.

[11] The respondent alleged that he had paid for the deposit of the said property for the sum of RM6,730 whereby RM4,730 was paid in cash and RM2,000 was paid by cheque. The respondent claimed that he did take out a bank loan to partially pay for the purchase of the said property. The proof of the payments made by the respondent are in the exhibits on pp 9–13 of bundle C which he kept. He only acknowledged the petitioner's contribution towards the said property to the amount of RM5,000 in cash.

THE DECISION

[12] I allow the petitioner's prayer in para 17(f), subject to the petitioner paying the respondent the total sum of RM4,568.40 in respect of the 'Cukai Tanah' and 'Cukai Harta' of the said property, and (g) of the petition for the following reasons:

(a) s 76 of the Law Reform (Divorce and Marriage) Act 1976 ('the Law Reform Act') empowers the court to order the division of matrimonial assets. The portion of s 76 which apply to this case is sub-s (1) and (2) which are as follows:

> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

A (2) In exercising the power conferred by subsection (1) the court shall have regard to —

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

B (b) any debts owing by either party which were contracted for their joint benefits;

(c) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court shall incline towards equality of division.

(Emphasis added.)

C Even though sub-s (2) provides that 'the court shall incline towards equality of division' to convey a mandatory provision that phrase, however, is qualified by the earlier phrases 'the court shall have regard to — 'as well as' "and subject to those considerations';

D (b) the said property was acquired during the marriage. Based on the testimonies of SP1 and SP2 / the petitioner, I am more inclined to believe their testimonies as against the testimony of the respondent. By his own admission, the respondent was at the time of his marriage working as a clerk and earning RM400–RM500. The said property was bought and

E registered in the petitioner's name on 7 January 1992. Even though in the marriage certificate in exh A, p 8, bundle A, showed the petitioner as having no job, I accept the petitioner's testimony that she was working at that time. Otherwise it cannot account for how the petitioner and the respondent managed to set up home with a baby coming along very soon

F after their marriage was registered;

(c) from the testimonies of SP1 and SP2, the respondent exhibited a mean personality, mean in terms of his non-supporting the petitioner and her two daughters financially let alone emotionally, and has a tendency to being abusive physically and mentally to them. That being the kind of

G person the respondent is, I cannot accept his testimony as being true when he testified that he was the one who paid the deposit sum for the said property and not the respondent, and yet at the same time his agreeing to the petitioner's 'request' to have the said property registered in her name and not his name just because she had asked him to do so;

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(d) it is undisputed and unchallenged evidence that the said property was acquired in the sole name of the petitioner and all the receipts by the developer are in the petitioner's name and not in the respondent's name — pp 9–13, C;

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(e) the respondent was unable to produce contemporaneous documentary evidence to show that he had contributed to the payment of the said property vide his bank statements for the years 1986 till 1990;

(f) what is more revealing is the fact that the respondent, in his application

in Form 19B of the National Land Code to lodge a caveat on the said property (pp 18–20, B) failed to state in his 'Surat Akuan' dated 4 September 2008 that he had paid the deposit towards the purchase of the said property. He merely stated that he paid the monthly loan repayments as well as the 'Cukai Tanah' and 'Cukai Harta';

(g) even though the petitioner had admitted to the fact that the respondent had paid for the monthly bank repayments after she and her daughters left the matrimonial home in september 2007, but that was due to the respondent refusing to leave the said property. It stands to reason for the petitioner refusing/unable to make the monthly payments as she had to pay RM260 monthly rental for the Jalan Maju House as well as payments for the condominium unit which she bought as an alternative home for herself and her daughters. To me, the monthly repayments of RM287 to the bank made by the respondent is only right and proper as he would have to pay rental towards another accommodation if he had decided to move out from the said property. The said repayments in my considered opinion do not constitute/amount to the respondent's 'contribution' towards the matrimonial home;

(h) the respondent had bald-facedly admitted that, as he was suffering from 'selalu pening kepala' in 1998, and in 2005 he had hypertension (without tendering evidence to that effect), he could not work, despite taking medication for his ailments and therefore his income had been reduced and eventually he stopped working altogether. In his testimony and submission, the respondent fell short of asking the petitioner to give him maintenance even though he had pleaded for it! He had not made any contribution to the well being of the family other than being a disruptive force in the family home and physically and mentally abusive to the petitioner and her two daughters. He had failed to provide the financial support to enable SP1 to continue with her studies and who had to drop out of school and go to work to support herself. And yet in another instance the respondent claims that he earned between RM800 to RM1,000 a month in 1992 as an insurance agent, to explain away how he was 'able' to pay for the said property;

(i) the respondent claimed, in his answer to question 24, R1, that he took out a bank loan of 45% of the purchase price. This statement flies directly against the documentary proof tendered by the petitioner on pp 14–16, B, which showed that it was the petitioner who took out the RM35,000 bank loan. It does not stand to reason why, if it was true that the respondent was the one who took the loan, the letter from the bank on pp 14–16, B approving the loan was addressed to the petitioner and not to the respondent;

(j) however, seeing that the petitioner in her submission, did concede that the respondent did pay a total of RM510 for 'Cukai Tanah' for the years

1991–2010, and a total of RM4,058.40 as 'Cukai Harta' for the same period in respect of the said property, I order the petitioner to pay to the respondent the total sum of RM510 + RM4,058.40 = RM4,568.40 for the 'Cukai Tanah' and 'Cukai Harta' paid by the respondent; and

(k) the fact that the petitioner also owns the condominium unit does not have a bearing on my finding with regards to the almost non-existent contribution by the respondent towards the acquiring of the said property by the petitioner. The petitioner had stated that the condominium unit is for the use of the third child who is studying and the unit is located near to the place she is studying. As the petitioner has not seriously made any claim on the shares owned by the respondent, which was not declared by the respondent himself in the first place, and which the respondent had admitted during cross-examination to having 150 share counters whereby the respondent would have earned dividends in the thousands of ringgit (see pp 129–142, B), I am of the view that the respondent is very well placed to acquire his own new accomodations should he decide to do so. The case of *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103; [1989] 1 CLJ (Rep) 639 cited by learned counsel for the respondent is distinguished.

MAINTENANCE OF CHILD, PHUA SIN HUI

[13] The learned petitioner's counsel is only requesting maintenance for the third child, Phua Sin Hui for the sum of RM500 per month. I note that the respondent testified that he was able to provide RM300 per month for her maintenance.

[14] Seeing that:

(a) the respondent has failed, neglected and/or refused to show proof of his actual income, even though he had been served with a notice to produce in encl 28;

(b) I accept the testimony of SP1 and the petitioner that the respondent had all this while not maintained the third child;

(c) I am of the opinion that based on the fact that the respondent does play the share market, he does derive a rather lucrative income from the shares he has traded in; and

(d) the third child is schooling in the secondary school and would therefore incur higher costs attending school,

I find that the respondent is able to pay maintenance of RM500 per month to

the third child, and I do so order with effect from 1 July 2011.

OTHER PRAYERS

[15] For the reasons already alluded to, I would also grant the orders sought for by the petitioner in prayers 17(a) and (b), whilst prayers 17(h), (i) and (j) are not applicable.

CONCLUSION

[16] In view of the foregoing I therefore order as follows:

(a) by consent, prayers 17(c) and (d), in respect of Phua Sin Hui only, are allowed;

(b) prayers 17(a), (b), and (g) are allowed;

(c) prayer (f) is allowed subject to the petitioner paying the respondent the total sum of RM4,568.40 in respect of the 'Cukai Tanah' dan 'Cukai Harta' of the said property;

(d) prayer 17(e) is allowed only in respect of Phua Sin Hui for the sum of RM500 per month with effect from 1 July 2011; and

(e) costs of RM7,000 to be paid to the petitioner.

Ordered accordingly.

Reported by Kanesh Sundrum